which has occasioned a failure of justice. (See section 422 Criminal Procedure Code).

The remaining points in this well-argued appeal may be disposed of shortly. It was submitted that the conviction was bad since the learned President had not recorded a formal finding of 'Guilty' but proceeded straightaway to conviction. Section 173 (m) (2) reads as follows :—

"If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law."

There is no requirement that the finding of 'Guilty' shall be formally recorded unless the accused pleads guilty. It is sufficient if the record shews clearly that the Court did find the accused guilty. In this case before convicting and sentencing the appellant the learned President delivered a long judgment in open Court which made that fact abundantly clear.

Several points were taken with reference to certain evidence which I consider the learned President admitted and weighed correctly.

I do not consider the sentence in any way excessive.

The appeal against conviction and sentence is dismissed.

Appeal dismissed.

Solicitors: *Joseph & Son.*

HASHIM & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Abbott and Spenser Wilkinson JJ.) December 6, 1954]

[K. L. — F.M. Criminal Appeal No. 65 of 1954]

Penal Code ss. 34, 300, 324, 392 and 397 — Whether it is permissible upon a charge of murder to convict of robbery — Dangerous weapon.

Criminal Procedure Code (Cap. 6), ss. 166 and 165 — Alternative charge.

Evidence — Statement to the police which resulted in the discovery of weapon used in the commission of offence.

The appellants were jointly charged with two others with the murder of one Chan Ah Leong. Apart from the confessions made by the two appellants before a Magistrate and their statements made from the dock at the trial there was no direct evidence as to which of the two appellants inflicted the injuries which caused the death of the deceased. Both the appellants admitted that they were present at the killing but each alleged that the other had struck the fatal blow. The assessors with whom the learned trial Judge agreed found that there was no satisfactory proof of common intention by both appellants to kill the deceased or to inflict fatal injuries upon him; and came to the conclusion that it was the first appellant rather than the second appellant who inflicted the injuries. There was evidence that the first appellant made a statement to the police which resulted in the discovery of the weapon, an iron pipe, which had been "used in the murder" and a hidden handkerchief bundle containing some of the deceased's belongings.

Held: (1) in the circumstances of the case neither of the appellants could be convicted of murder unless it could be found that the injuries were inflicted in furtherance of a common intention under the provisions of section 34 of the Penal Code; (2) information supplied by a person in custody which resulted in the discovery of the weapon used in the commission of the offence does not lead to the discovery of the weapon. It leads to the discovery of the fact that the weapon is concealed to the knowledge of the informant, and if the weapon is proved to have been used in the commission of the offence, the fact discovered is relevant, but in this case the words "used in the murder" deposed to by the Police are inadmissible; (3) a length of iron piping can hardly be described as a "deadly weapon" and section 397 of the Penal Code does not, like section 324, extend the meaning of dangerous weapon.

Upon a charge of murder it is not permissible to convict of robbery. If at the outset the appellants had been charged with an alternative charge of robbery they would have been entitled to make an application for these charges to be tried separately and such application would have been successful.

Cases referred to:—

(1) *Pulukuri Kotayya v. R.* L.R. 74 I.A. 65.

(2) *Norottam v. R.* (1888) A.W.N. 95.

COURT OF APPEAL (CRIMINAL).

K. L. Devaser for the 1st appellant.

2nd appellant in person.

B. Sheldon (Federal Counsel) for the respondent.

The judgment of the Court was delivered by:—

Spenser Wilkinson J. : — The two appellants were jointly charged with two others with the murder of one Chan Ah Leong, a cigar hawker. At the close of the case for the prosecution Counsel for the Defence submitted that there was no case against the 3rd and 4th accused and, the prosecution agreeing with this, the 3rd and 4th accused were acquitted. The two appellants were called upon for their defence.

At the conclusion of the evidence the learned trial Judge asked the assessors the following two questions :—

"(1) Are you satisfied that the deceased died from shock and haemorrhage resulting from injuries he received on 20.10.53?

(2) Are you satisfied from all the evidence that both accused on 20.10.53 inflicted the wounds described by the Doctor with the intention of causing death or with the intention of causing such grave injuries that in the natural course of nature would result in death?"

To the first of these questions both assessors gave an affirmative answer, but to the second question the first assessor stated that he was satisfied that the 1st appellant did inflict the wounds with the intention of causing fatal injuries but he gave the benefit of the doubt to the 2nd accused and added that he was satisfied that the 2nd appellant intended only to commit robbery. The second assessor returned a similar answer to the second question. The learned trial Judge

agreed with the answers given by the assessors and thereupon convicted the 1st appellant of murder and the 2nd appellant of robbery contrary to sections 392 and 397 of the Penal Code.

It may here be remarked that it is difficult to see why section 397 was brought into the matter. A length of iron piping can hardly be described as a "deadly weapon" and section 397 does not, like section 324, extend the meaning of dangerous weapons.

Apart from the confessions made by the two appellants before a Magistrate and their statements made from the dock at the trial there was no direct evidence as to which of the two appellants inflicted the injuries which caused the death of the deceased. Both appellants admitted that they were present at the killing but each alleged that the other had struck the fatal blow. In these circumstances neither of the appellants could be convicted of murder unless it could be found that the injuries were inflicted in furtherance of a common intention under the provisions of section 34 of the Penal Code. It would appear from the findings of the assessors with which the learned trial Judge agreed that there was no satisfactory proof of a common intention by both appellants to kill the deceased or to inflict fatal injuries upon him; and it is somewhat difficult to see upon what grounds the assessors and the learned trial Judge came to the conclusion that it was the 1st appellant rather than the 2nd appellant who inflicted the injuries.

The Court below would appear to have been somewhat impressed by the evidence that the 1st appellant made a statement to the Police which resulted in the discovery of the iron pipe which had been used in the commission of the offence and a hidden handkerchief bundle containing some of the deceased's belongings. They appear to have overlooked the possibility that the 1st appellant led the Police to these articles not because he had used them himself but rather to assist the Police in convicting the other appellant.

It would perhaps be as well to point out that in giving evidence on this point the Police Inspector was allowed to relate more of the statement made by the 1st appellant than, under the authority of *Pulukuri Kotayya v. R.*[1] was strictly admissible. The evidence given by the Inspector on this point was as follows :—

"On 24.10.53 No. 1 accused gave me certain information. He told me that he could lead to the place where the iron pipe used in the murder was thrown away, and where he had hidden a handkerchief bundle containing some of the deceased's belongings."

The following passage from the judgment of the Privy Council in the case cited appears to be directly in point :—

"Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; . . . . . It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

From this passage it would appear clear that the words "used in the murder" deposed to by the Police Inspector in the present case were inadmissible.

In view of the facts that there was no finding that a common intention had been formed by the two appellants; that it could not be ascertained which of them had inflicted the fatal injuries; and that inadmissible evidence was admitted as against the 1st appellant the conviction of this appellant for murder could not stand and the conviction on this charge was, therefore, quashed and a re-trial ordered. It was pointed out that our order quashing the conviction of this appellant for murder would operate as an acquittal on that charge but would not prevent his being re-tried upon a charge of robbery or other similar charge.

With regard to the 2nd appellant the question arises whether it was permissible upon a charge of murder to convict of robbery. This depends upon the construction of section 167 of the Criminal Procedure Code which in turn refers back to section 166. There has been a considerable conflict of judicial opinion both in India and in this country as to the precise meaning of these sections. There is no doubt that upon a charge of murder the accused can be convicted of culpable homicide, of causing grievous hurt or of causing simple hurt. In each of these cases, however, the question of which offence was committed has to be resolved by ascertaining the precise intention with which the blow causing the injuries was inflicted.

Proof of theft or robbery, however, depends upon very different considerations and if at the outset the appellants had been charged with an alternative charge of robbery they would have been entitled to make an application for these charges to be tried separately and such application would, we think, have been successful. In an Indian case[2] cited in *Sohoni's* Code of Criminal Procedure, 14th edition page 500 it was held that upon

a charge of murder it is not permissible to convict of theft. The passage in the textbook reads as follows :—

"**Murder and theft.** — This section and section 236 refer to cognate offences, but do not relate to offences of so distinct a character as murder and theft. Where, therefore, a person charged with murder, was acquitted of that offence, but convicted of theft with reference to the provisions of this section; the conviction was altogether unwarranted, 1888 A.W.N., 95."

With this view we agree, and we are, therefore, of opinion that the 2nd appellant should not in the present case have been convicted of robbery, having been charged only with murder.

We would add that in the present case the facts proved were consistent either with robbery in the course of which the victim was killed or with the complete crime of murder followed by simple theft. The offence of robbery, therefore, was not strictly proved.

For these reasons we quashed the conviction of the 2nd appellant.

Order accordingly.

PUBLIC PROSECUTOR v. AHMAD BIN DIN

[Cr. R. J. (Thomson J.) August 30, 1956]

[Ipoh — Criminal Revision No. 19 of 1956]

Criminal Procedure — Magistrate holding Inquiry of death under Chapter XXXII of the Criminal Procedure Code (Cap. 6) — Whether competent to direct prosecution or order accused person's arrest for negligent driving.

Trial — Whether trial before the same Magistrate who had already judicially announced his belief in accused's guilt permissible.

On April 9, 1956, the accused in this case was driving a motor van when it collided with a bicycle as a result of which collision the rider of the bicycle sustained injuries from which he died a few days later. On July 30, 1956 the Magistrate at Teluk Anson held a Death Inquiry under Chapter XXXII of the Criminal Procedure Code (Cap. 6). After the accused (1st witness at the inquiry) had given his account of what had happened, the Magistrate announced: "I do not require to hear any more evidence." He then proceeded to record what he called a "verdict" in the following terms: "Misadventure caused by the negligent act of Ahmad bin Din. I direct that Ahmad bin Din be arrested and charged with negligent driving." In pursuance of this direction the accused was arrested and on the following day he appeared before the same Magistrate. He pleaded guilty and was convicted and fined $75 and had his driving licence endorsed.

Held on revision: (1) the Magistrate in this case had no power to direct the prosecution of the accused for any offence and in any event he had no power to direct the accused's arrest on a charge of negligent driving; (2) the trial in this case amounted to a miscarriage of justice: it cannot be said that justice is manifestly and undoubtedly seen to be done when an accused person appears for trial before a Magistrate who has already judicially announced his belief in his guilt.

Observations on the charge of negligent driving.

Case referred to —

(1) *R. v Sussex Justices* (1924) 1 K.B. 256, 259.

CRIMINAL REVISION.

Thomson J. : — The accused in this case has been convicted in circumstances which in my judgment call for the intervention of this Court.

On 9th April, 1956, the accused was driving a motor van on the Teluk Anson/Bagan Datoh Road when it collided with a bicycle as a result of which collision the rider of the bicycle sustained injuries from which he died a few days later. There were at least five persons who could throw light on this occurrence. These were the accused, a passenger in his van who took the injured cyclist to hospital, the hospital medical officer, a police officer who visited the scene the same evening and the driver of a bus which the accused was in the act of passing at the time of the accident.

On 30th July. 1956, the Teluk Anson Magistrate proceeded to hold a Death Inquiry under Chapter XXXII of the Criminal Procedure Code. The conduct of that Inquiry is not something which concerns this Court. It is something which concerns the Public Prosecutor. Nevertheless, I am compelled to consider the proceedings at it by reason of the light which they throw upon what happened subsequently.

The first witness to be called was the accused who gave his account of what had happened. I do not find it necessary to discuss his story in detail but the impression — and it is a firm impression — that is left in my mind after reading it is that it did not amount to an admission of or shew an intention to admit anything more than an error of judgment.

The Magistrate, however, would seem to have regarded it in a different light and, as soon as he had heard it, announced "I do not require to hear any more evidence". He then proceeded to record what he calls a "verdict" in the following terms :—

"Misadventure caused by the negligent act of Ahmad bin Din.

I direct that Ahmad bin Din be arrested and charged with negligent driving."

It is not for me to deal with the adequacy or the correctness of these proceedings. That is a matter for the Public Prosecutor. And in that connection the Public Prosecutor has adequate powers. Nevertheless, I must point out in the first place that the Magistrate had no power to direct the prosecution of the accused for any particular offence or indeed at all (that was a matter for the Public Prosecutor) and in the second place that in any event he had no power to direct the accused's arrest on a charge of negligent driving. It may be that in the circumstances he had power to order his arrest on a charge under section 304A of the Penal